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IN THE

Supreme Court of the United States

October Term, 1962

No. 701

ERNEST KLEIN,

Petitioner,

AGAINST

WALSTON & CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

MAXIMILIAN BADER,
Counsel for Petitioner,
50 Church Street,
New York, N. Y.

LOOSE APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WORth 2-0689

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The brief in opposition to the instant petition makes much of a technical claim that the instant petition was filed late. The petition was timely filed as will now be shown.

Facts

The order of the Court of Appeals sought to be reviewed was entered on September 27th, 1962. Notice of this Order was given to the petitioner considerably more than 10 days later. Shortly after petitioner received such

notice from respondent he ordered a Certified Copy of the Record from the Court of Appeals but this was not delivered to the petitioner's attorney until December 27th, 1962. The instant petition for a writ of certiorari was served by mail upon the attorneys for the respondent on December 21st, 1962 and received in the office of the Clerk of the Supreme Court on December 26th, 1962. (Actually the petition was in the office of the Clerk on December 24th, 1962 but this day, being an "unofficial" holiday in the District of Columbia the Clerk did not act on the petition until December 26th, 1962.) The Certified Copy of the Record of the Court of Appeals was received in the office of the Clerk on December 28th, 1962 which was the date that the Clerk docketed the instant petition.

ARGUMENT

The Petition Was Timely Filed

The time for filing a petition for a writ of certiorari is set forth in 28 U. S. C. 2101 (c) which reads as follows:

> "* * * Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit, or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days. * * * *"

Rule 23(3) of the Supreme Court Rules (which cannot conflict with the Statute), reads in part as follows:

> "* * * A petition for a writ of certiorari in all other cases shall be deemed in time when it and the certified record required by Rule 21 are filed with the Clerk within the time prescribed by law. * * * "

It is conceded that, if the time from which the petitioner obtained *notice* of the New York Court of Appeals' Order is used to compute the ninety day period then there is no question as to the timeliness of the instant petition since notice was not given the petitioner of said Order until a considerable time *subsequent* to the entry of the Order (as appears from the *Notice of Entry* attached to the Order). Since petitioner's time under the New York Rules would not commence to run until after *Notice of Entry* of the Order was given (and obviously petitioner could not be required to take any action until he knew about the entry of the Order), 28 U. S. C. 2101, should be interpreted to read "* * * ninety days after *notice of* entry of such judgment or *decree* is received by the petitioner. * * * " (words italicized supplied). Any other interpretation would, of course, be a violation of due process of law.

However the petition is timely even if the effective date of entry of the Order was September 27th, 1962. The Rules provide that the day of entry must be excluded (see, *Smith* v. *Gale*, 137 U. S. 577). Thus the date to be used would be September 28th, 1962. Ninety days from that date is December 26th, 1962 and, on that date the instant petition for a writ of certiorari was *filed* in this Court. The Clerk refused to docket this petition on that date because the Certified Copy of the record of the Court of Appeals had not yet been received. However, it has been held by this Court, in a case directly in point, that if a petitioner takes any step within the time allowed to per-

fect his appeal the time stops running at that point. In *U. S.* v. *Adams*, 6 Wall. 101, 18 L. Ed. 792 (793), an appellant filed his Notice of Appeal in time but failed to take the further steps as required by the Rules of this Court. In considering the timeliness of the appeal the Court ruled as follows:

> "* * * We consider the paper filed by the solicitor in the office of the Clerk of the Court as sufficient in form to indicate the intention to exercise this right. * * *"

Finally the petitioner points out that, under the peculiar circumstances of the December 24th "unofficial holiday" in the District of Columbia, two additional days should be granted to petitioner to file his papers. December 24th was not held to be a legal holiday in Washington but this Court was closed under the Executive Order of the President of the United States. The next available day for business was December 26th, 1962 and therefore the December 24th, 1962 and December 25th, 1962 period should be excluded from any period of limitation. Indeed had the Court been open on December 24th, 1962 petitioner could have filed an application for an extension of time which would have been received by the Court on December 26th, 1962 and thus would have extended his time. The failure of the Court to be open on December 24th, 1962 thus severely prejudiced petitioner (a resident of the State of New York) and therefore the two-day period should not be held against him.

Respectfully submitted,

MAXIMILIAN BAIER,
Counsel for Petitioner,
50 Church Street,
New York, N. Y.